(3)

U. S.
FILED
MAY 19 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

34-38, 56-57, 62-64, 68-983-4

Nos. ~~999-1003, 1072-3, 1087-9, 1121-2, 1190-1.~~

IN THE MATTER OF THE REORGANIZATION OF THE
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

DEBTOR.

BRIEF OF LIFE INSURANCE GROUP COMMITTEE AND MUTUAL SAVINGS BANK GROUP COMMITTEE IN OPPOSITION TO PETITIONS FOR CERTIORARI.

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
Attorneys for Life Insurance Group,
11 South La Salle Street,
Chicago, Illinois.

FRED N. OLIVER,
WILLARD P. SCOTT,
Attorneys for Mutual Savings Bank Group,
110 East 42nd Street,
New York, New York.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
OLIVER & DONNALLY,
Of Counsel.

May 18, 1942.

THE LAWYERS PRINTING COMPANY, 343 WEST MONROE, CHICAGO

INDEX.

PAGE

Foreword 1

I. A Review of the Decision Below Is Not Warranted on the Ground That It Is in Conflict With Those in the Milwaukee or Western Pacific Reorganization Proceedings 9

A. The Holding That the Stock Interests Are Without Value 9

B. The Allocation of Securities Among Creditors 11

II. The Petitions for Certiorari of the Debtor and the Committees for the Preferred and Common Stockholders (Nos. 999-1001, 1121-2, 1190-1) 15

III. The Petition for Certiorari of the City Bank Farmers Trust Company, Trustee Under the First and Refunding Mortgage (Nos. 1072-3) 22

A. The Treatment of the RFC Loan, to Which the City Bank Objects, Became Necessary on the Basis of the Fixed Charge Level Which the Bank Advocated and the Commission Approved 22

B. The Commission's Treatment of the RFC Claim Does Not Show the Plan To Be Discriminatory Against the Holders of First and Refunding Bonds and in Favor of the Unsecured Creditors 27

C. The First and Refunding Bondholders Have Overwhelmingly Disapproved the City Bank's Attack on the Plan 32

D. City Bank's Miscellaneous Objections to the Procedure Adopted in Certifying, Approving and Confirming the Plan 33

(1) Absence of Information in Submission Pamphlet Concerning City Bank's Appeal From the Approval Order 33

(2) Weight Attributed to the Vote of Acceptance 34

(3) Continuance of Litigation by Mortgage Trustee After Overwhelming Acceptance of Plan by Bondholders..34

IV. The Petition for Certiorari of Irving Trust Company, Trustee under the Milwaukee & State Line Mortgage (Nos. 1087-9)..... 35

A. Objections to Commission's Method of Determining State Line Earnings Were Correctly Overruled 36

(1) The Commission's Use of Severance Studies to Determine Earnings of the State Line 37

(2) Determination of Past Earnings of State Line 41

(3) Contention That All Earnings of State Line Should Have Been Capitalized Into Fixed Interest Bonds... 43

B. No Substantial Question Is Presented by the State Line Trustee's Objections to Confirmation of the Plan Notwithstanding Its Rejection by Holders of a Minority of State Line Bonds 44

V. The Petition for Certiorari of Susman, et al., Holders of Unsecured Convertible Bonds (Nos. 1002-3) 49

Appendix 51

Table of Cases.

Canada Southern Railway Co. v. Gebhard, 109 U. S. 527 ..... 47, 48
Case v. Los Angeles Lumber Products Co., 308 U. S. 106 ..... 25, 31
Colorado v. United States, 271 U. S. 153 13
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510 ..... 12, 25, 29, 31, 36, 41
Continental Bank v. Rock Island R. Co., 294 U. S. 648 ..... 8, 25, 48
Dickinson Co. v. Cowan, 309 U. S. 382 46
Great Northern Ry. v. Merchants Elevator Co., 259 U. S. 285 36
In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 124 F. (2d) 754 ..... 9, 10, 11, 12, 14, 15
In the Matter of Western Pacific Railroad Company, 124 F. (2d) 136 ..... 9, 10, 11
Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445 ..... 28, 29, 31
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 47
N. C. & St. L. Ry. v. Browning, 310 U. S. 362 28
Nebbia v. New York, 291 U. S. 502 49
New England Divisions Case, 261 U. S. 184 14
Northern Pacific Ry. v. Boyd, 228 U. S. 482 ..... 25, 29
United States v. Baltimore & O. R. Co., 293 U. S. 454 .. 13

Statutes.

Bankruptcy Act, Sec. 77; 11 U. S. C. A. Sec. 205:
Subsection (b) 15
Subsection (c)(10) 41
Subsection (c)(12) 46
Subsection (d) 2
Subsection (e) 15, 21, 32, 33, 34, 44, 46, 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 999-1003, 1072-3, 1087-9, 1121-2, 1190-1.

IN THE MATTER OF THE REORGANIZATION OF THE

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

DEBTOR.

BRIEF OF RESPONDENTS, LIFE INSURANCE GROUP AND MUTUAL SAVINGS BANK GROUP, IN OPPOSITION TO PETITIONS FOR CERTIORARI.

Foreword.

This brief is filed on behalf of the Life Insurance Group Committee, consisting of eleven life insurance companies,[1]

[1] The member companies of the Life Insurance Group are the following:

Aetna Life Insurance Company
John Hancock Mutual Life Insurance Company
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
New England Mutual Life Insurance Company
New York Life Insurance Company
The Connecticut Mutual Life Insurance Company
The Mutual Benefit Life Insurance Company
The Northwestern Mutual Life Insurance Company
The Prudential Insurance Company of America
The Travelers Insurance Company.

and the Mutual Savings Bank Group Committee, consisting of two hundred and fifty savings banks,[1] in opposition to the petitions for certiorari. These interests own securities of the debtor, Chicago and North Western Railway Company, in the principal amount of more than one hundred million dollars.

The Interstate Commerce Commission's plan of reorganization for this large railroad property, which has now been approved and confirmed by the district court and the circuit court of appeals, and overwhelmingly accepted by the creditor interests, is the product of seven years of most intensive and earnest effort. The exacting statutory process set up to safeguard public and private rights in the enterprise has finally run its course.[2] If this Court permits, reorganization may now be effected. It may be effected, not through the medium of negotiation and bargaining, but on the basis of a plan which the agency selected by Congress has found to "be compatible with the public interest". (Section 77(d)) The plan represents an administrative determination of factual issues by the

[1] The savings banks which comprise this Group are represented by a committee consisting of the following institutions:

Bowery Savings Bank, New York
Central Savings Bank, New York
Dry Dock Savings Institution, New York
Emigrant Industrial Savings Bank, New York
Greenwich Savings Bank, New York
Howard Savings Institution, Newark, New Jersey
Meriden Savings Bank, Meriden, Connecticut
New Bedford Institution for Savings, New Bedford, Massachusetts
Norwich Savings Society, Norwich, Connecticut
Provident Institution for Savings, Boston, Massachusetts
Savings Banks Trust Company, New York
Springfield Institution for Savings, Springfield, Massachusetts
Suffolk Savings Bank, Boston, Massachusetts
Western Savings Fund Society, Philadelphia, Pennsylvania.

[2] A brief chronology of the proceeding is submitted in an appendix.

Commission and has been the subject of a most extensive judicial review. Every issue which ingenuity could contrive to defeat the plan has been fully weighed, twice by the district court and finally by the circuit court of appeals. The plan has been approved and confirmed by both courts, and overwhelmingly accepted by the creditors in the manner prescribed by law.[1]

The development of the Commission's plan involved three major steps, (1) a determination of the earning value of the properties for the prospective normal year, (2) a determination of the permissible capitalization and capital structure of the reorganized company, and (3) the allocation of securities to the debtor's mortgage bondholders. In the taking of those steps, the Commission stated fully and clearly the reasons for its conclusions.

The conclusion as to earning value, expressed in the amount available for fixed charges in the prospective normal year, was based upon (1) the prospective normal

[1] On January 22, 1941, the Commission submitted the approved plan to the creditors for acceptance or rejection, in accordance with the direction of Section 77(e). By order of May 13, 1941, the Commission certified the results of the submission to the district court as follows (R. 5314-5326):

Creditor Class	Total Outstanding	Percentage votes accepting plan are of total votes cast
Preferred claims	$ 25,823	100.
General mortgage bonds	132,019,000	96.06
Sioux City & Pacific R. R. bonds	4,000,000	100.
Milwaukee & State Line bonds	2,500,000	50.37
Manitowoc, Green Bay & Northwestern bonds	3,750,000	100.
St. Paul Eastern bonds	1,120,000	83.79
Milwaukee, Sparta & Northwestern bonds	15,000,000	98.28
Des Plaines Valley bonds	2,500,000	98.66
St. Louis, Peoria & Northwestern bonds	10,000,000	99.56
1st and refunding bonds	47,822,000	97.75
15-year 6½% bonds	14,775,000	98.43
Convertible 4¾% bonds	72,335,000	87.10
Collateral promissory notes	47,313,882	100.
General claims	1,017,375	98.66
Total	$354,178,080	96.2

freight tonnage[1] (R. 3512-3), (2) the average haul for the normal year (R. 3514), (3) the applicable ton-mile rate (R. 3514), (4) the total freight revenues (R. 3515), (5) passenger revenues (R. 3515), (6) other revenues (R. 3515), (7) total operating revenues for a normal future year (R. 3515), (8) operating expenses (R. 3515-6), and (9) net railway operating income (R. 3516-7).[2] The consideration of those factors led the Commission to the following conclusion:

> "Our plan of reorganization should be based accordingly on a normal expectancy of income available for fixed charges produced by the two properties of not to exceed $14,625,000 * * *." (R. 3518)

Determination of the permissible capitalization and

[1] Searching studies were made respecting the prospective movement of each class of traffic. The nature and scope of the investigation may be illustrated by the survey made of the past and prospective movement of agricultural commodities by this road, and by competing agencies of transportation, such as trucks and waterways. (R. 2104-2109; Com. Exs. 369, 370) Field studies were carried on throughout the entire territory served to obtain the opinions of state agricultural officers, rural traffic officers and station agents of the debtor and other railroads. A detailed questionnaire was submitted to the agricultural agent in each county through which the road operates and the returns collated and analyzed. Full use was made of the facilities of all of the agricultural colleges in the territory. (R. 2124-2134) Agricultural policies were studied as to their probable bearing upon the production and export of agricultural commodities. (R. 2095-2096) Similar painstaking investigations were made in respect to all of the principal commodities transported. (Com. Exs. 380, 382, 384, 385 and 391)

[2] In making these findings, the Commission had before it the underlying studies prepared by the staff of the Trustee in Bankruptcy under the direction of the responsible department heads of the railroad aided by a large staff of assistants who labored for many months. (R. 2094 ff.) Among other things these comprehensive studies dealt with the volume, consist and trend of traffic and earnings during the preceding twelve years, production trends and conditions, competitive factors and impairment in earning power. (R. 2095-2134) Four estimates based on these studies were presented to the Commission and fully considered by it in reaching its conclusions as to each item. (R. 3512-8)

capital structure involved (1) a detailed study of the corporate and financial structure of the debtor company, including a determination of the property subject to each of the debtor's mortgages as a first lien, the original cost thereof, and the cost of reproduction less depreciation (R. 3518-27), (2) a careful consideration of the plan filed by the debtor (R. 3527-37), (3) a careful consideration of the plan filed by the Group Committees (R. 3537-59), (4) the position taken by parties other than the debtor and the Group Committees (R. 3560-4), and (5) the past earnings as shown by the debtor's books of accounts (R. 3567-9). A consideration of those factors led to the following conclusion:

> "Taking into account the reproduction value of the property and the favorable past earnings, as well as the unfavorable recent and prospective earnings, it would appear that the total capitalization at reorganization proposed by the group committees, $449,505,000 is approximately the amount that should be approved." (R. 3568)

The total capitalization was divided by the Commission into fixed interest debt, contingent interest debt, preferred and common stock, on the basis of the past and prospective earnings of the road. A portion of the interest on the fixed interest debt was made contingent and commutable so that the full interest rate of 4 per cent thereon would not become effective until after operating economies had been brought about through a proposed rehabilitation and improvement program. (R. 3568-9) As to the permissible capitalization and its division into classes of securities, the Commission finally concluded:

> "From a consideration of the entire record, including the elements of value referred to, the earnings and prospective earnings, and especially the impairment in earning power of the properties, we conclude and find that the capitalization and fixed and contingent charges of the reorganized Chicago & North Western Railway Company, immediately upon reorganiza-

tion, including the bonds and stock proposed by the group committees for a rehabilitation and improvement program, it being assumed that bonds to finance this program can be sold at a 4 per cent interest rate, should be approximately as follows, no-par-value common stock being included in the total at $100 a share:

Fixed-interest debt	$117,000,000
Contingent-interest debt	105,000,000
Preferred stock	107,000,000
Common stock	121,000,000
Total Capitalization	$450,000.000"

(R. 3569)

In the allocation of securities, the Commission first deducted from the permissible fixed interest debt of $117,000,000, the amount of equipment obligations which were "so well secured that they should be assumed as unaltered as to terms in reorganization" (R. 3570), the amount of the PWA and RCC claims which it found to be fully secured (R. 3570), and the part, $25,000,000, of the RFC claim which a designated portion of the security therefor would "fairly support." (R. 3571) That left a balance of $62,243,000 of new fixed interest securities for distribution. (R. 3571) In making the distribution thereof the Commission had before it "extensive studies along three lines of approach, namely, segregation of earnings, severance value, and contributive income value." (R. 3571) The Group Committees, in their proposed plan of reorganization, had applied those studies to the average depression year, 1931-35, in the allocation of approximately $65,000,000 of fixed interest bonds. The Commission found that the allocation "correctly reflects the relative earning power, expressed in terms of contribution to the debtor's income available for fixed charges, of the several mortgage lines under depression conditions * * *" (R. 3572), and concluded:

"The allocation may thus properly serve as the basis

> of the distribution of the $62,243,000 of new fixed-interest securities proposed herein for distribution to holders of outstanding bonds and to the Reconstruction Finance Corporation as pledgee. Similarly the allocation of bonds to be pledged with the banks and the Railroad Credit Corporation may be made on the same ratios. In making such distribution on this basis, the holders of the first lien bonds on the Sioux City & Pacific and Des Plaines lines must be assigned new bonds for 100 per cent of their claims, before any assignment is made to holders of first and refunding mortgage bonds in recognition of their second lien on these properties." (R. 3572-3)

In the allocation of income bonds, preferred and common stock, the income studies were also used. On the basis of the studies and the earnings of the normal prospective year, the Group Committees had allocated such securities in their proposed plan of reorganization. With respect to that allocation, the Commission found:

> "This allocation, taken with the allocation of fixed-interest securities already mentioned, will, with adjustments, correctly reflect the relative earning power of the several mortgage lines under the conditions of the normal prospective year, and the relative value of other claims as compared with those secured by mortgage" (R. 3575),

and concluded:

> "The allocation may thus properly serve as the basis of the distribution of the income bonds, preferred stock, and common stock proposed herein." (R. 3575)

In fixing the new capitalization the Commission took "into account the reproduction value of the property and the favorable past earnings, as well as the unfavorable recent and prospective earnings" (R. 3568), so as to avoid the elimination of any interests which could reasonably be permitted to participate in the reorganized company. Nevertheless, it found that "The permissible capitalization is thus insufficient to provide for satisfaction of all credi-

tors' claims in full." (R. 3578) Indeed, the Commission found it necessary to cancel more than $41,000,000 of the claim of the Convertible Bondholders and other unsecured debt, with the balance being recognized only in common stock, and to eliminate the old stockholders entirely. (R. 3578, 3677)

If the reorganization of this property may now proceed to a conclusion on the basis of the plan formulated by the Commission, confirmed by the courts and accepted by the creditors, more than seven years will have been consumed in the bankruptcy proceeding. The many reasons which exist for avoiding an extension of that period would give way to the necessity of correcting any substantial failure to satisfy the statutory process, but we submit that none exists and that the petitions make no such showing of probable error as to warrant the granting of certiorari.

This Court has stressed the legislative intent that railroad reorganizations under Section 77 be consummated with all practicable speed,[1] and in view of that pressing consideration, we respectfully ask that the Court examine the Commission's report as a basis for the ruling upon the petitions for certiorari. It will be seen, we believe, that never before in the history of railroad bankruptcies has it been possible to accomplish the reorganization of a major railroad upon the basis of a factual investigation so complete and a determination of every issue so painstaking and so sound in its protection of both public interest and private rights.

---

[1] In *Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648, the Court said:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted." (p. 685)

I.

A REVIEW OF THE DECISION BELOW IS NOT WARRANTED ON THE GROUND THAT IT IS IN CONFLICT WITH THOSE IN THE MILWAUKEE OR WESTERN PACIFIC REORGANIZATION PROCEEDINGS.

Petitioners ask certiorari on the ground, among others, that the decision below is in conflict with that of the same court in the *Milwaukee* proceeding, and with the decision of the ninth circuit in the *Western Pacific* case.[1] Our position is that the decision below is so clearly right that no question of substance can be raised in respect to it, and that certiorari should be denied for that reason.

The subject divides naturally into two parts: (A) the position of the equity and (B) the allocation of securities to creditors.

A. The Holding That the Stock Interests Are Without Value.

There is no conflict of any character or in any degree between the decisions in this proceeding and in the *Milwaukee* case, respecting the equity interests in the respective properties.

Here, as in the *Milwaukee* case, the court of appeals specifically sustained the ruling of the district court affirming the Commission's finding that the stock interest is without value. The following quotations from the two opinions demonstrate the absence of any conflict as to this issue:

---

[1] *In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 124 F. (2d) 754 (C. C. A. 7, December 4, 1941); *In the Matter of Western Pacific Railroad Company*, 124 F. (2d) 136 (C. C. A. 9, November 28, 1941).

MILWAUKEE.

"We are well satisfied that the evidence supports the finding of the Commission approved by the District Court 'that the equity of the holders of the debtor's preferred stock and its common stock has no value'."

"Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I. C. C. as to absence of value of old common and preferred stock, is specific, definite and certain, and fully meets the rule which requires finding on values of assets.

"Second, we meant to hold, and do hold, that the evidence supports this finding, that there is no value to either the common or preferred stock of debtor." (R. 2311, 2335, in Nos. 875-83)

NORTH WESTERN.

"In as much as the outstanding obligations exceed $450,000,000, it follows that there is no equity for the holders of the old stock. Unless the $450,000,000 figure can be raised, the common and preferred stockholders must be eliminated. * * * It [the new capitalization of $450,000,000 as found by the Commission] meets our approval, not only because it is supported by evidence and is the finding of the I. C. C., but our independent study of the reports convinces us that a larger sum could not be sustained by the company's future business. * * * The finding which determined the absence of value in the common and preferred stock must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (R. 5799, 5802, 5805)

It will be seen that the court of appeals not only held the findings of the Commission on this issue to be adequate in form, but, on the basis of the court's own independent study of the record it held that the evidence proved the stock interests in each of the properties to be without value and thus required their exclusion.

In the *Western Pacific* case, on objections of the stock interests, the court of appeals held that "it was necessary to determine the value of the debtor's property". It did not enter upon any discussion of the adequacy in substance or form of the extensive findings actually made by the Commission, and it gave no consideration to the evidence. Unlike the seventh circuit, the court made no effort to test the fairness of the plan by looking at the evidence to see whether it fully supported, or perhaps compelled, the conclusion reached by the Commission. Whether it was the court's duty to do so and thus utilize every re-

course at hand in an effort to appraise the fairness of the plan, and by doing so to effectuate the purposes of Section 77, we need not discuss. The decisive point here, we believe, is that in this proceeding, as in the *Milwaukee* case, the court of appeals went to the record and found that it required the exclusion of the stock interest and would in fairness permit no other result. In view of these very different circumstances we submit that the different result reached in the *Western Pacific* case does not create the conflict which petitioners seek to establish as a basis for granting certiorari.

B. The Allocation of Securities Among Creditors.

In the *Western Pacific* case, as we have pointed out, the court of appeals did not go to the record in an effort to make any independent determination of the fairness of the Commission's treatment of the stock interests, as did the court of appeals here and in the *Milwaukee* proceeding. Similarly, in the *Western Pacific* case the court did not undertake the burden of determining whether the evidence supported the provisions of the plan governing the allocation of securities to creditors. But in the case at bar each of the courts below made its own examination of the record, and on that basis, approved the Commission's allocation to creditors as fair and equitable. On these facts we submit that here also the asserted conflict in respect to the two decisions does not exist.

In the *Milwaukee* case, however, the court found, as it did in this proceeding, that the evidence supported the Commission's allocation of securities among creditors. It held that "The plan as such, ignoring the absence of findings, has support in the evidence." (R. 2312 in Nos. 875-83) Nevertheless the court "reluctantly" remanded the proceeding to the Commission for more specific findings. But only seven weeks later, following the filing of the petitions

for certiorari seeking review of that decision, and after full argument in the case at bar, the same court sustained the district court's approval of the plan, notwithstanding its view that the Commission's findings, like those in the Milwaukee report, were not "sufficiently specific." (R. 5813) In thus approving the plan the court refused to give dominant weight to form as it had in its decision in the *Milwaukee* case.

In its report here the Commission declared that its allocation of new securities among the debtor's bondholders "*correctly reflects the relative earning power of the several mortgage lines*" (R. 3572-3575), on the basis of "extensive studies along three lines of approach, namely, segregation of earnings, severance value and contributive income value." (R. 3571) The report contains a detailed exposition of the formulae and methods employed in determining, on the basis of the relative earnings values of the several mortgage divisions, the proper distribution to creditors, together with a disclosure of all factors considered, and the results obtained. The petitioners do not contend that the record which was before the court is incomplete or lacks clarity in any respect. The court thus had the fullest opportunity to exercise its function under the statute. It is clear, we believe, that nothing more in the way of findings is required by the decision in *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510. No serious attempt had been made in that proceeding to determine the earning power of the entire enterprise or of any of its parts separately. The Court was concerned there with matters of substance, not with form.

The court below, while stating that the Commission's findings were not satisfactory in form, held that the form of the findings respecting the treatment of creditor claims presented only a "procedural question" which was "non-jurisdictional in character," and that on the basis of its own examination of the record it was able to pass upon and satisfy itself in all respects as to the lawfulness of the

plan. In thus disposing of "the findings requirement" the court emphasized:

> "The completeness of the evidence on the specific issue whereon findings could and should have been made.
>
> "The conclusive nature of other findings which make coverage by the missing specific findings less important.
>
> "The persuasive effect of facts shown by the record and reduced to findings by the I. C. C., which strongly support the plan submitted and approved by the District Court and the creditors." (R. 5813)

Even if the Commission's findings were not "sufficiently specific", and we think they were, the court was sound in its view that in any event the findings were "non-jurisdictional", like those under discussion in *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 464, in which the Court said:

> "In the Florida Case (*Florida* v. *United States*, 282 U. S. 194) the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court (compare *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 675), is not fatal to the validity of the order."

In *Colorado* v. *United States*, 271 U. S. 153 (1926), an effort was made to enjoin an order of the Interstate Commerce Commission permitting the abandonment of a branch line in Colorado under the provisions of the Transportation Act of 1920. It was contended, in the words of the Court, "that the order is void, so far as it relates to intra-state traffic, because essential findings were not made

and, also, because essential findings made were not supported by the evidence." The Court rejected such a contention and refused to impose impractical requirements as to findings,[1] saying at page 169:

> "An examination of the extensive record and of the three opinions of the Commission convinces us that no relevant fact was ignored, that there was ample evidence to support the facts found * * *."

In sum, the court of appeals held in the *Milwaukee* proceeding, as it did here, that the evidence supported the plan certified by the Commission. Nevertheless, that plan, the product of almost seven years of conscientious effort, was remanded to the Commission on the ground that formal findings were indispensable, and that a definitive conclusion on every issue, fully supported by the evidence, was not enough. But seven weeks later the court refused to sacrifice substance, holding it to be sufficient here that out of its own knowledge of the record the plan was fair and equitable and, moreover, had been overwhelmingly accepted by the creditors voting. This is the nature and the measure of the conflict between the two decisions in this circuit. Our reasons for believing the *Milwaukee* decision to be erroneous, and based upon a misconception of the decisions of this Court, are stated in our petition for certiorari. (Nos. 875-83) In the case at bar the court of appeals has avoided the error which it made in that decision.

We believe that the conflict in the degree in which it actually exists, and in the light of the circumstances out of which it arises, does not furnish any foundation for review of the decision below in this proceeding. We make

[1] A short time earlier, in upholding the Commission's order as to the division of joint through rates under the provisions of the Transportation Act of 1920 against attacks on the "method of proof and of adjudication pursued," the Court had held: "Obviously, Congress intended that a method should be pursued by which a task, which is imposed upon the Commission, could be performed." *New England Divisions Case,* 261 U. S. 184, 197 (1923).

this earnest request that certiorari be denied in the belief that it is not the rule of this Court that certiorari must be granted under all circumstances and in all cases and simply as a matter of course, upon any showing of conflict.

We submit that the court's holding that the plan is fair and equitable, based upon its own examination of the record, satisfies the letter of the statute, and effectuates the legislative purpose respecting the function to be performed by the court.

II.

THE PETITIONS FOR CERTIORARI OF THE DEBTOR AND THE COMMITTEES FOR THE PREFERRED AND COMMON STOCKHOLDERS (Nos. 999-1001, 1121-2, 1190-1).

Here, as in the *Milwaukee* proceeding the Commission found, and both courts below affirmed the finding, that the equities of the preferred and common stockholders are without value.[1] The record leaves no doubt that the earning power of this railroad has been so greatly crippled that the old stock is without value. This reduction in earning power has not stopped with the destruction of value of the stock. It has cut deeply into the claims of creditors, with the result that over $41,000,000 of the creditors' claims are also valueless, and are accorded no participation in the reorganized company.

The circuit court of appeals succinctly stated the factors which have caused this result:

[1] "A plan of reorganization," Section 77(b) provides, "may include provisions modifying or altering the rights of stockholders generally, or any class of them, either through the issuance of new securities or any character, or otherwise; * * *"; Subsection (e) of Section 77 provides that: "submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, * * * that at the time of the finding the equity of such class of stockholders has no value * * *."

"The indebtedness of the debtor increased more than 110% in twenty-two years, 1919 to 1941.

"The freight traffic decreased 39% in twenty years, 1920 to 1940.

"The passenger traffic declined 51% during the same period.

"There have been large annual deficiencies for more than a decade." (R. 5801-2)

The average annual income available for interest during the ten-year period, 1931-1940, was only $6,263,108, less than one-third the amount required to service the funded debt outstanding on the effective date of the plan, January 1, 1939. (R. 5579) The Commission estimated that the income of the property available for interest in the "normal future year", without payment of any federal income taxes, would be $14,625,000. (R. 3518) In contrast with its earnings record and this estimate of its future earnings, the property would require annual earnings of $19,283,137 to service the funded debt of $431,390,104 (principal and unpaid interest on the effective date of the plan) at the average rate of 4.47 per cent. (R. 2859, 3677) If the permissible capitalization had been high enough to permit an allotment of no par common stock, taken at $100 per share, for the cancelled portion of the creditors' claims (as of December 31, 1941), there would be needed an annual income of $26,977,740 in order to pay interest on the new bonds and a 5 per cent dividend on the new stocks.

Since the available earnings are insufficient to provide income in the amount necessary to cover interest on creditors' claims, it is apparent that the equity of the old stockholders has totally disappeared. Under these circumstances, it was, of course, the duty of both the Commission and the courts to deny to the old stockholders any participation in the reorganized company. The words of the Senate Committee on Interstate Commerce in its

Report No. 454, May 18, 1939, page 5, are directly pertinent to this railroad:

> "Reorganizations cannot succeed if they are based on claimed values that have long since disappeared in a realistic sense and on business that has long since been lost to the railroads never to return. A reorganization based on a sound judgment of earning power destroys no values and creates no losses. It merely realistically recognizes the facts, including the unpleasant but nevertheless inescapable fact that values based on original cost or even reproduction cost simply do not exist without earning power to support them."

The Commission described the conditions which had brought about the "impairment in earning power" which it found to exist (R. 3578) as follows:

> "Competing forms of transportation, loss of export trade, and shifts in sources of traffic appear to have brought about a continuing change for the worse, as regards any reasonable expectation of the ability of this property to produce earnings sufficient to support a capitalization in which the present stockholders might be recognized as possessing equities of any value. Definitely a short-haul carrier, and one looking to passenger traffic for a large part of its business, results show that the debtor has proved particularly vulnerable to highway competition. Capture of traffic by pipe lines has also been a serious factor, and the pipe line system is expanding." (R. 3579)

On the subject of future earning power, the Commission said:

> "The earnings of the normal prospective year are $14,625,000. In order to pay a 5 percent dividend on the new preferred stock approved by us, earnings would have to amount to $17,778,207 a year. This preferred stock participates equally, share for share, with the common stock, to the extent of $1 a share, in any dividend paid on the common stock in excess of $5 a share. In order to pay a 6 percent dividend

> on the new preferred stock, and a 6 percent dividend on the new common stock which would have to be issued to creditors before present stockholders could be recognized, annual earnings would have to amount to $28,568,000, a figure approximating predepression record earnings. It is apparent that stock preceded by securities calling for such earnings could have only the remotest of speculative value, if any; and that any subscription warrants representative of such values would be scarcely worth the cost of engraving." (R. 3579-3580)

On the comprehensive record before it, the Commission has made the following determination:

> "From a consideration of the entire record, including the elements of value referred to, the earnings and prospective earnings, and especially the impairment in earning power of the properties, we conclude and find that this result cannot be avoided, and that the equities of both classes of stockholders have no value." (R. 3578)

The Commission's administrative determination as to the earnings value of this property was based upon studies and estimates as comprehensive and complete as any ever made in a bankruptcy proceeding. (See page 4, *supra*) The facts revealed by those studies not only support the Commission's finding that the equities of the stockholders are without value; they compel that conclusion, and both the lower courts so found.

The district court had before it the record certified by the Commission, and in addition heard a large number of witnesses called by the debtor. On the basis of the entire record the district court held:

> "Neither does the court find warrant in the evidence for disapproving the finding of the Commission that the equities of preferred and common stockholders have no value. On the contrary that finding is overwhelmingly supported by the evidence and the court

is forced to conclude as did the Commission that stockholders should not participate in the allocation of securities." (R. 5031)

"The court finds that the Commission's estimate of probable earnings in a normal future year is sufficiently optimistic and that it did not fail to give effect to any substantial evidence before it relating to earnings. The evidence introduced before the court bearing on this subject has been considered but has not moved the court to disagree with the Commission." (R. 5044)

Subsequently, at the hearing on confirmation of the plan in the summer of 1941, after full consideration of the earnings up to that time, and the reasons for such earnings, the district court once again found "that the equities of the present shareholders of the preferred and common stock herein, being Classes 19 and 20, as specified in the order fixing the classes of creditors herein, have no value." (R. 5594) The court emphasized, as one of the reasons for so holding, that the earnings of the property have been and must continue to be insufficient to service its debt. (R. 5579-80)

Moreover, the circuit court of appeals, in addition to the statements quoted above on pages 9 and 15, stated:

"It (the capitalization established by the Commission) meets our approval, not only because it is supported by evidence and is the finding of the I. C. C., but our independent study of the reports convinces us that a larger sum could not be sustained by the company's future business." (R. 5801-2)

"It must, however, be a fact of vital importance that a substantial increase in revenue and a corresponding increase in value of assets would still leave nothing upon which the old stockholders could predicate a value for their stock." (R. 5804-5)

The court of appeals held:

"The finding which determined the absence of value

in the common and preferred stock must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (R. 5805)

The efforts of the debtor, and others representing the stockholders, to avoid the Commission's conclusion upon the complicated and technical issue of fact respecting the value of the equity interest do not raise any question of substance for the determination of this Court. It cannot be controverted that the evidence supporting the Commission's finding that the stock is without value, is not only ample but overwhelming, as both courts below have held. As a result, the debtor's objections take a different direction. A number of highly technical and tenuous points are raised concerning the form of the Commission's report and certain statements made by the court of appeals in sustaining it. We discuss these briefly, but the basic determination of the Commission, approved by the courts, —that the stocks are without value—is essentially unchallenged, and we respectfully assert that this leaves the stock interests without standing or interest to continue their opposition to the reorganization of this property.

The Other Considerations Urged By the Debtor Do Not Raise Any Question of Substance.

(1) The debtor states that "the primary issue" arises out of the fact that the court of appeals emphasized and gave weight to the creditors' overwhelming approval of the Commission's plan. This and many of the other questions discussed by the debtor have nothing to do with the holding that the stock may not participate in the plan. In passing upon the objections of the several mortgage trustees, we think the court very properly took note of the fact that the bondholders themselves had overwhelmingly approved the plan. But the point is entirely foreign to the status of the stock interests represented by the debtor.

The Commission having found the stock to be without value, the plan was not submitted to the stockholders. (Section 77(e)) The district court approved and affirmed that finding by the Commission, not because of the vote by the bondholders, but because "that finding is overwhelmingly supported by the evidence." (R. 5031) The court of appeals refused to set aside the affirmation of this finding by the district court, not because of the vote by the bondholders but because "our independent study of the reports convinces us that a larger sum (capitalization) could not be sustained by the company's future business." (R. 5801-2) Therefore, the court held that the finding "must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (R. 5805)

(2) The debtor and the common stockholders committee contend that "the Commission erred in refusing to consider a plan of consolidating the properties of the debtor and of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company." (Debtor's Petition, p. 17; Common Stockholders Petition, pp. 13-22.)

After full hearing on this issue the Commission declined to enter upon a proceeding looking to a consolidation of these properties, finding, in part, as follows:

> "The number of persons, interests and communities that would be affected by consolidation makes it certain that it could be approved, if at all, only after very extended hearings. Where so many communities are affected, years would be taken to abandon lines and settle the other requests that are necessarily involved. Meanwhile, interest required to service existing debt is running nearly $49,000,000 a year, largely unpaid, and still further preventing the stockholders from having any interest in the property." (R. 3406)

The courts below held that the Commission committed no error of law in declining to hold up pending reorganiza-

tions while such remote possibilities were being canvassed. We submit that they were clearly right.

Because no substantial controversy exists in respect to the finding that the stock is without value, we request that the petitions for certiorari of the debtor, the preferred stockholders committee, and the common stockholders committee be denied.

III.

THE PETITION FOR CERTIORARI OF THE CITY BANK FARMERS TRUST COMPANY, TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE (Nos. 1072-3).

The holders of the First and Refunding Mortgage bonds voting on the submission almost unanimously approved the plan and the treatment which it provides for their bonds. (*Infra*, pp. 32-3) Nevertheless the City Bank Farmers Trust Company seeks certiorari. The City Bank trustee contends that the treatment of the RFC loan "establishes a yardstick" which shows discrimination "against the holders of First and Refunding bonds in favor of Reconstruction Finance Corporation or in favor of the unsecured creditors or in favor of both." (City Bank's Petition, pp. 14, 15)

A. The Treatment of the RFC Loan, to Which the City Bank Objects, Became Necessary on the Basis of the Fixed Charge Level Which the Bank Advocated and the Commission Approved.

The North Western borrowed more than $42,000,000 from the Reconstruction Finance Corporation in the years 1932, 1933, 1934 and 1935. The total debt including interest amounted to $49,184,905 on January 1, 1939, the effective date of the plan. (R. 3677) The RFC notes were secured by the pledge of collateral of $100,784,800 principal

amount. (R. 5032-3) The pledged securities are of three kinds, consisting of (a) system collateral of $48,883,800, made up of securities of affiliated companies necessary to the operation of the debtor; (b) non-system securities of $2,249,000 (having an approximate market value of $1,600,000), representing investments in companies unrelated to the operation of the system; and (c) General Mortgage bonds and First and Refunding bonds of the debtor in the principal amount of $49,652,000.

The Commission had, in theory, three methods of treating the RFC claim, as the district court pointed out—(1) paying it in cash, (2) preserving the status quo by issuing new fixed interest notes for the full amount of the claim, secured by the same collateral, replacing the debtor's bonds with the allocable proportion of new securities, or (3) permitting the noteholder to foreclose and take ownership of the pledged collateral. (R. 5033)

(1) The first method was impossible because the necessary cash was not available.

(2) The second method could have been adopted under the level of fixed charges proposed in the Groups' plan of reorganization. That plan provided fixed interest debt of $141,000,000, with the RFC being allotted fixed interest bonds for the full amount of its claim, thereby assuring the surrender of all the pledged collateral. (Ex. 495, pp. 21, 43-4) But the City Bank opposed the effort of the Groups to provide an amount of fixed interest debt necessary to deal with the RFC claim in that manner. The Commission quoted the City Bank's statement of position in its report,[1] and approved a plan providing for fixed debt in the amount of $117,000,000 (R. 3676), approxi-

[1] "The trustee of the first and refunding mortgage contends that a plan of the type proposed by the group committees could not be put into effect at the present time without grave danger that the reorganized company would fail from the start to earn its fixed charges; * * *." (R. 3560)

mately $25,000,000 less than that proposed by the Groups. The Commission found (R. 3570), and the court held (R. 5037), that on this lower basis of fixed interest debt, notes carrying fixed interest could not equitably be issued to the RFC for the full amount of its claim. To have treated the claim in that manner would have reduced by 20 to 25 per cent the fixed bonds available for allocation to all other creditors, as the court pointed out, and no party contended for such a result.

(3) The third method of permitting the RFC to foreclose upon all the pledged collateral would have taken from the reorganized company, securities of affiliated companies necessary to the operation of the road, in the amount of almost $49,000,000. This, the Commission naturally felt, must be avoided. To do so it was necessary to employ a combination of the second and third methods. The plan allots to the RFC for approximately one-half of its claim a new note secured by part of the pledged collateral, and permits foreclosure by the RFC upon the remainder thereof. The $48,883,800 of system collateral consisting of securities of affiliated companies was repledged under the $25,000,000 note, thus avoiding loss of control over properties necessary to the debtor's operation. (R. 5034) Foreclosure was allowed of the $2,249,000 of non-system securities and the $49,652,000 of the debtor's bonds.

The treatment of the RFC loan was described as follows by the district court:

> "The Commission, by a combination of the second and third methods, treated the Reconstruction Finance Corporation claim in such a way as to avoid as many of the difficulties as possible. To reduce the amount of the claim it turned over outright the non-system Union Pacific and New York Central securities; the loss of these does not disturb the system. In order to preserve intact the system collateral essential to system operations, it provided for as large

a note as those securities would support as collateral. In order to avoid an additional collateral note, thus reducing fixed charge obligations allocable to bondholders, it then allotted outright the remainder of the pledged collateral, consisting of the Debtor's General and First and Refunding mortgage bonds. Thus the Commission adopted a combination of the above methods for treating the Reconstruction Finance Corporation claim in the way which would result in the least disturbance to the system and the least disadvantage to the public holders of the Debtor's bonds. The considerations just enumerated as well as considerations set forth in earlier portions of this opinion lead to the conclusions that while the amount of securities allotted to the Reconstruction Finance Corporation is large—large because the amount of collateral presently held is large—it is not excessive." (R. 5034)

The City Bank contends that the plan "fails in important respects to conform to the law of the land as laid down by this Court" in the ***Boyd, Los Angeles Lumber,*** and *Consolidated Rock Products* decisions. (City Bank's Petition, p. 13) The City Bank does not, however, point out any particular shortcoming. Not only is the plan consistent with those decisions, but this Court in *Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648 (1935), passed upon the very issue which is the basis of the RFC treatment here involved.

In that case the Court held that an injunction may issue to "delay the enforcement of the contract," but only when shown that a sale of the collateral would prevent the formulation of a plan and that it is necessary to stay the sale to protect the reorganization process. The Court, in permitting the injunction only to "delay" the exercise of the remedy of sale, expressly stated that the substantive rights of the creditor in respect of the pledged collateral were not impaired. As stated by the Court, the question for decision was whether the bankruptcy court

had "authority to enjoin the sale of the collateral here in question if a sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as probably to prevent it." (p. 675) It was found that the sale would have that effect. The Court found:

> "The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action." (pp. 676-7) "The injunction here goes no further than to delay the enforcement of the contract." (p. 681)

It was on the basis of these findings that the Court answered the questions stated above in the affirmative and sustained the injunction as accomplishing merely a "delay in the enforcement of the contract." It is entirely clear from the opinion that foreclosure of the collateral is a right which may be interfered with only temporarily and to the extent necessary to permit the consummation of a plan of reorganization.

Here, likewise, under restraint of the injunction by the district court, the collateral was not sold or reduced to possession by the noteholder during the time necessary to formulate and promulgate a plan of reorganization. (R. 11) The statutory process was fully protected. The Commission and the court, however, took the "further action" contemplated in the Rock Island opinion by certifying, approving, and confirming the plan of reorganization. Certainly the foreclosure provided in the plan cannot "hinder, obstruct and delay the preparation and consummation of a plan of reorganization." Instead the Commission and the courts found that foreclosure to the extent permitted, was absolutely necessary to effectuate the

reorganization of this property. The district court, which entered the injunction against sale of any collateral pending a plan, found, in its opinion approving the plan, that the Commission has provided treatment for the RFC "which would result in the least disturbance to the system and the least disadvantage to the public holders of the Debtor's bonds." (R. 5034)

The circuit court of appeals also pointed out that:

> "* * * if we assume that the plan be rejected and the proceedings dismissed, its [the RFC's] legal right so to do [foreclose on its collateral] would be clear.
>
> "However, the debtor would be greatly embarrassed through the sale of $94,000,000 of its obligations for less than fifty cents on the dollar. The I. C. C., therefore, at the expense of the R. F. C. sought to protect the debtor. Protecting the debtor was protecting all of the other groups of security holders." (R. 5815)

The fact that the Commission found that it could not soundly commit the reorganized company to pay fixed interest in an amount sufficient to hold this large loan in status quo, and allowed the RFC to foreclose on a portion of its collateral in order to cause the least possible shock to the debtor's system and its bondholders, does not render the plan discriminatory in any respect.

B. The Commission's Treatment of the RFC Claim Does Not Show the Plan To Be Discriminatory Against the Holders of First and Refunding Bonds and in Favor of the Unsecured Creditors.

The City Bank trustee contends that the Commission, by permitting the RFC, as pledgee, to foreclose on certain of the collateral held by it, put a value upon the new securities allotted to the First and Refunding mortgage of less than forty cents on the dollar. Upon this premise it is asserted that the claim of the First and Refunding bond-

holders was not satisfied, and therefore that any allotment to the unsecured creditors was unlawful. The Bank is mistaken. As the district court held, with the circuit court of appeals affirming:

> "The treatment of the Reconstruction Finance Corporation proves nothing whatsoever as to the value of the new securities except that the Commission believes that the new securities allotted to the Reconstruction Finance Corporation could not be liquidated for an amount in excess of the Reconstruction Finance Corporation claim." (R. 5022-23)

The treatment of the RFC does no more than recognize its right to the ownership of the system bonds. The attack of the City Bank upon the plan rests upon the fact demonstrated by the treatment of the RFC claim, that those bonds cannot presently be liquidated at one hundred cents on the dollar; consequently, it is argued, the holders of those bonds have not been fully compensated, and, therefore, unsecured creditors should be excluded from the plan. Although the City Bank refrains from so stating, this is an argument that the fairness and the lawfulness of the whole reorganization plan must be judged on the basis of the *present cash market value* of the new securities rather than upon a determination of a proper capitalization and valuation of the property as a whole in the light of its probable future earning capacity and all other relevant factors. This is not the law.

An extensive railroad system, taken as a whole, does not have a cash market value in any practical sense. *N. C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 370 (1940). As was said in the *Kansas City Terminal* case, "Practically, it is impossible to sell the property of a great railroad for cash." (271 U. S. 445, 455) It would not be sensible to base a reorganization plan on an assumed or theoretical cash price which no one would actually pay. Instead this

Court has repeatedly said that the offer must be fair in the light of all the circumstances and very recently has clarified those statements by declaring that the criterion of future earning capacity is controlling. *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510, 526 (1941)

The *Boyd* case itself makes clear that current cash market values are not determinative. The Court said:

> "This conclusion does not, as claimed, require *the impossible* and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of *income bonds* or *preferred stock.*" (228 U. S. 482, 508)

If reorganization plans were based on current cash values, there would be nothing at all "impossible" in paying in cash every claimant participating in the plan whether secured or unsecured. The reorganized company could do so merely by selling the securities allotted to each claimant and paying him the cash proceeds. The court recognized in the *Boyd* case that any such action was "impossible" because plans of reorganization are not based on cash value, and specifically held that full observance of the rule of priorities does not require the satisfaction of the senior claims in cash. It is perfectly evident that the "income bonds or preferred stock" to which the Court referred in the foregoing quotation would not sell for par or anything like it on the effective date of the reorganization.

That the values to be considered are not restricted to present cash values was also stated by the Court in the *Kansas City Terminal* case, 271 U. S. 445, 455, as follows:

> "Unsecured creditors of insolvent corporations are entitled to the benefit of the values which remain after lien-holders are satisfied, whether this is *present or prospective,* for dividends or only for purposes of control."

It cannot be emphasized too strongly that none of the equity cases ever purported to determine or to satisfy the priorities of the parties participating in the plan on the basis of the present cash value of their interests. It is a matter of common knowledge that if the distribution of new securities were based on the bids at a foreclosure sale, or on present cash values, however determined, all claimants beyond the first lien bondholders would be excluded in practically every instance.

It is obvious that the North Western could not be sold for a sum in cash equal to the amount now due on the divisional and General Mortgage bonds and claims ranking prior thereto. If the Commission had attempted to allot securities on that basis, it must have given the First and Refunding bonds a much smaller interest than they receive in the present plan. The allocation of securities among the various classes of creditors must rest upon the earning capacity of the various properties which comprise the system, and that likewise must be an estimate. With such estimates as its foundation the Commission arrived at a capitalization of all the assets of the enterprise, both mortgaged and free, which substantially exceeds the total of the secured debt against the company, but is much below the aggregate of the claims of all creditors.

In its original report, the Commission states:

> "This allocation, taken with the allocation of fixed interest securities already mentioned, will, with adjustments, correctly reflect the relative earning power of the several mortgage lines under the conditions of the normal prospective year, and the relative value of other claims as compared with those secured by mortgage." (R. 3575)

The supplemental report, discussing the petition of holders of certain unsecured Convertible bonds for more favorable treatment than they were accorded in the plan, states:

> "The bonds are thus not secured by mortgage or other lien on any property and can participate in the

> reorganization only on the basis of the free assets and the value of pledged assets in excess of liens thereon." (R. 3669)

The capitalization as determined by the Commission does not permit the satisfaction in full of the claims of the holders of these Convertibles totaling $86,651,302 and other unsecured debt. Instead, the Commission found that under the plan more than $41,000,000 of such claims must be canceled and the balance recognized only in no par common stock. (R. 3677) On the other hand, the debtor's secured creditors not only receive 100 per cent of their claims in new securities, including varying amounts of fixed interest and contingent interest bearing bonds, and preferred stock, but the common stock received by the secured creditors is taken by them on a much more favorable basis than that upon which the common stock is taken by the unsecured creditors. This method of recognizing and preserving the priorities was expressly sanctioned in the *Kansas City Terminal* case, and that decision was cited and relied upon both in the *Los Angeles Lumber Company* case and in the more recent decision in the *Consolidated Rock Products* case.

The plan recognizes and fully protects the rights of the First and Refunding bondholders, the RFC, and the unsecured creditors, both as to their absolute rights; and as to the rights of each in relation to the others. We submit that the contention that the priorities have been violated because the plan and the treatment of the various classes of creditors is not based on present cash market values does not present a question of substance for the determination of this Court.

C. The First and Refunding Bondholders Have Overwhelmingly Disapproved the City Bank's Attack on the Plan.

Upon receipt of the district court's opinion of approval, the Commission submitted the plan to the affected creditors for acceptance or rejection, in accordance with the mandatory direction of the statute.[1] Along with the ballot, the Commission sent each creditor a printed pamphlet containing the plan, the Commission's original and supplemental reports, and the opinion and order of the district court approving the plan, as Section 77(e) provides.[2] In addition to the comprehensive discussion in the Commission's reports of all factors relevant to the formulation of the plan of reorganization, including treatment of the RFC loan and all other claims, five printed pages of the pamphlet were devoted to a full discussion by the district court of the City Bank's objections to the plan. (pp. 151-156 of submission pamphlet; R. 5019-5025)

The results of the submission which were certified to the court showed that holders of $24,090,000 principal amount of First and Refunding bonds, or 97.75 per cent of all First

[1] Section 77(e) provides in part: "If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed • • • for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: • • •."

[2] The submission pamphlet is a part of the record but is not reprinted. (R. 5703, 5826)

and Refunding bonds voting,[1] had accepted the plan, and $552,000, or 2.25 per cent, had rejected it. (R. 5318) Of the $552,000 voting against the plan, only $163,000, or 29.53 per cent, were voted by holders other than the City Bank which itself voted $389,000, or 70.47 per cent, as trustee of various trusts. If the $389,000 of First and Refunding bonds voted in rejection of the plan by the City Bank (together with a $1,000 bond which the City Bank voted in acceptance of the plan) were disregarded, the percentage approving the plan would be increased from 97.75 per cent to 98.91 per cent.[2] Notwithstanding this overwhelming rejection of the City Bank's position it has continued its efforts as mortgage trustee to defeat the plan of reorganization which its bondholders have almost unanimously approved.

D. City Bank's Miscellaneous Objections to the Procedure Adopted in Certifying, Approving and Confirming the Plan.

(1) *Absence of Information in Submission Pamphlet Concerning City Bank's Appeal From the Approval Order.*

The City Bank contends that the Commission in submitting the plan for acceptance or rejection "failed to disclose the material and relevant fact" that it, as trustee, was appealing from the order of the district court approving the plan. (City Bank's Petition, p. 11) The explicit terms of Section 77(e) answer this contention. In making the submission the Commission distributed precisely the material that the statute directed it to send to those entitled

[1] Section 77(e) provides in part that: "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan * * *."

[2] Copies of the ballots were certified to the court by the Commission and are parts of the record but not reprinted. (R. 5599, 5826)

to vote, namely, "the plan * * * together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge * * *." (Section 77(e)) The reports of the Commission and the opinion and order of the judge were printed and distributed in full text.

(2) *Weight Attributed to the Vote of Acceptance.*

The City Bank further contends that "Coupled with the refusal of the Commission to advise the independent bondholders of the appeals taken by their mortgage trustees," improper emphasis was placed on the overwhelming vote of the bondholders accepting the plan. (City Bank's Petition, p. 29) On the contrary, the opinion shows quite clearly that the court below, while properly emphasizing the overwhelming vote of approval, made an independent finding that the plan is fair and equitable. (R. 5809, 5810, 5813)

(3) *Continuance of Litigation by Mortgage Trustee After Overwhelming Acceptance of Plan by Bondholders.*

The City Bank objects to the dictum of the circuit court of appeals criticizing the activities of certain mortgage trustees. The court, however, answered any possible objection in this regard when it said that: "Coming now to the more specific questions, *and conceding the right of the trustees to raise them,* we take up the criticisms of the bondholders of the different groups." (R. 5813)

The petition of the City Bank as trustee under the First and Refunding mortgage does not present any important or special reason in support of its request for a writ of certiorari, and should be denied.

IV.

THE PETITION FOR CERTIORARI OF IRVING TRUST COMPANY, TRUSTEE UNDER THE MILWAUKEE & STATE LINE MORTGAGE (Nos. 1087-9).

The principal ground of objection by this trustee is directed to the method by which the Commission determined the earnings value of the Milwaukee & State Line. This line secures an issue of $2,500,000 first mortgage bonds.

As a basis for its determination of the value of the respective mortgage lines the Commission had before it, among much other data, the results of three studies, called, for convenient designation, segregation, severance and contributive income studies.

The Commission described the three earnings studies as follows:

> "As a basis for the proper allocation of this $62,243,000 of new fixed-interest securities the record contains extensive studies along three lines of approach, namely, segregation of earnings, severance value, and contributive income value. In the segregation studies it was determined what the separate earnings of each mortgage line have been on the basis of the traffic as it actually moved, revenues being assigned according to a formula reflecting as close an approximation as possible to the divisions of joint rates which would normally have been applied if the individual mortgage lines had been separately operated railroads, and hauls of company material being adjusted for on a cost basis. The formula, being based on the actual movements of traffic, does not take into account the fact that if the system were broken up much of the traffic might be differently routed; or in lieu of a different routing something other than the usual division of rates might have been arranged. The segregation studies were accordingly supplemented by the severance studies. The latter show in each instance the loss of system net income which would result from the severance of the particular mortgage line. In each

instance where the severance method was adopted as the basis of ultimate valuation, it was found that the line in question was of greater value as part of the system than as severed therefrom. The contributive income studies show the benefit derived by the system from the traffic originating or terminating on each mortgage line." (R. 3571-2)

A. Objections to Commission's Method of Determining State Line Earnings Were Correctly Overruled.

It is contended that the Commission should not have followed the severance value studies and that it should, instead, have adopted the segregation basis. The trustee further urges that if the Commission did not err in using the severance value studies, then they should have been given weight only for the future and not for the past, and also that the entire amount of the earnings, measured by the severance studies, should have been capitalized into fixed interest bonds. These contentions were considered at length by the Commission, both in its original report and in the supplemental report, and were unanimously rejected by the full Commission as having no merit. They were again discussed fully by the district court and again rejected. (R. 5013-9) The circuit court of appeals affirmed these rulings of the Commission and the district court. (R. 5815)

The determination of earnings of a particular line in a railroad system is a matter in which "the inquiry is essentially one of fact and of discretion in technical matters" and which is peculiarly within the competence of the Commission. *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. As this Court stated in the *Consolidated Rock Products* case:

> "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." (312 U. S. 510, 527)

The facts of this case were determined by the Commission. Its determination was made upon a very comprehensive record. The trustee does not contend that the record is incomplete or lacks clarity in any respect. We submit that the State Line trustee's criticisms of the Commission's conclusions furnish no ground for certiorari, and propose to show further that the reasons stated by both courts below for upholding the Commission's determination were correct.

(1) *The Commission's Use of Severance Studies to Determine Earnings of the State Line.*

The State Line trustee has cited cases in which segregation studies were approved, as if all lines of railroad were alike and the earnings of all could be measured by a single formula. The fact is, however, that the State Line is not an ordinary line of railroad. It was constructed solely to provide a by-pass line for the purpose of making a saving to the system through reduced expenses. (R. 5017) It controls no traffic. Indeed, there is not a single station on the line, although during short periods of the year, local trains will stop to pick up cabbage, and some sand and gravel for road work is unloaded on the line. (R. 3068) Over 96% of its traffic neither originates nor terminates on the line. (R. 1653) Referring to the State Line and to certain other segments of the North Western's system, the earnings of which were also found to be properly determined by the severance value studies, the Commission stated that:

> "* * * their function is almost wholly to serve as bridge lines for the more economical handling of traffic which would otherwise be carried by alternate routes over general mortgage lines." (R. 3582)

Any piece of road like the State Line, the function of which is solely to provide an alternative route for a seg-

ment of the system main line, has a value to the system which is measured only by the amount the system saves by using the alternative route.

The detailed severance studies prepared by the debtor's officers and by other experts showed that the traffic routed over the State Line could be handled, instead, over the General Mortgage lines as in fact it was, prior to the construction of the State Line. (R. 3123) To do so, however, would increase the system's expenses approximately $51,000 in an average depression year, $57,000 for the year 1936, and somewhat larger amounts in the normal prospective year. (I. C. C. Ex. 594, pp. 3, 8, 11; R. 3244, 3249.) Those figures, the Commission found, represent the amount which the use of the State Line is worth to the system in the respective years, and measure the yearly "earnings" of that line. The argument advanced is that the Commission should be compelled to accept the results of the segregation studies as establishing the value of the State Line rather than to measure its value by the savings which it produces as an alternative route. This means that in determining the value of the respective mortgage divisions the Commission must credit the State Line with the revenue derived from all the traffic which moves over that line, notwithstanding the fact that that traffic is wholly produced and controlled by other lines, and that the continued use of the State Line has value only in the degree that it results in more economical operation.

The Commission considered the arguments of the State Line trustee at length. The contributive income studies described by the Commission showed practically no value for the State Line, for there is almost no traffic originated or terminated on that line. That result obviously did not constitute a fair measure of its earnings value and the Commission did not rely on those studies in allocating new securities to the State Line.

It was also apparent that the results of the segregation studies did not reflect the true earning position of the State Line since those studies did not take account of the fact that other mortgage lines originated and controlled the traffic which was routed over the State Line merely for the purpose of system convenience and economy. In the words of the Commission:

> "Some would have the segregation studies applied to the exclusion of the severance studies. The segregation studies, as has been stated, fail to take into account the fact that if the system were broken up much of the traffic might be differently routed than at present." (R. 3583)

The State Line trustee contends that the severance value of the State Line should have been disregarded because the studies involved the making of estimates and the exercise of judgment as to the ability of the present General Mortgage lines, with such additional construction as might be necessary, to handle the traffic which has been routed over the State Line. The trustee's brief repeatedly asserts that the alternative routes over the General Mortgage lines are "hypothetical," "non-existent" and "impracticable." (For example, see p. 44 of Trustee's Brief.) This contention, also, is one which the Commission, as an expert administrative body, was uniquely qualified to consider. The Commission's report stated as follows its conclusion on this point with regard both to the State Line and to the other bridge lines:

> "The other objections of the trustee go to particulars of the application of the general theory of the severance studies; questioning the ability of the company to provide the alternate routes and maintain train schedules thereon with expenditures for additional facilities no greater than those estimated in the studies. Such questions have been sufficiently covered by the testimony of competent engineers and operating officials of the railroad, and the group committees, the weight of which supports the assumptions on which

the conclusions of the severance studies are based. These objections are not sustained.'"[1] (R. 3584)

The district court reviewed at length the methods by which the Commission had determined the earnings value of the State Line and the other bridge lines, including the Sparta. (R. 5013-5019) Its discussion included a detailed statement of the relative merit of segregation and severance studies as applied to bridge lines. (R. 5016) Its conclusions were expressed as follows:

> "The contributive income study is not a fair measure of the earning power of the three lines since no one of the three originates or terminates any substantial volume of traffic. Neither was the segregation study a fair measure of the earning power of the three lines. It reflected the earnings on traffic as it actually moved and ignored the fact that the control of such traffic was not in the hands of the bridge line over which it happened, for system convenience, to move. The value of a bridge line to a system is that which it saves the system in providing a more economical route. A severance study measures that value. For this reason the severance study was adopted by the Commission and is adopted by the court as the measure of value of the three lines in question." (R. 5017)
>
> "The assumption that since the segregation study showed relatively large earnings by the Sparta line the Sparta bondholders were disadvantaged is without foundation. We have seen that since the Sparta line is a bridge line, which does not originate or terminate traffic, the only fair measure of its value to the system is a severance study. Accordingly, the showing of a segregation study on the line is of no disadvantage or advantage to any one, it is simply of no significance." (R. 5017)

---

[1] The Acting General Manager of the debtor testified before the Commission that the studies provided for facilities "to satisfactorily handle the diverted traffic and effect a service equal to that now provided by use of the Milwaukee and State Line Railway." (R. 3153)

The State Line trustee seems to contend that Section 77 of the Bankruptcy Act requires the Commission to treat the segregation formula as if it were the mandatory and exclusive measure of the earnings value of all lines of railroad. (Petition of Irving Trust Co., p. 44) While Section 77(c)(10) refers to the keeping of accounts which will permit of "a segregation and allocation * * * of the earnings and expenses," it does not specify the method by which the true earnings are to be ascertained nor limit in any manner the scope of the Commission's inquiry into the factors which determine the real earnings value of a particular line. As the Court stated in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527:

> "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case."

(2) *Determination of Past Earnings of State Line.*

The argument that the Court should require the Commission to treat the segregation study as a proper measure of earnings for the past years, as distinguished from the future, was considered and rejected by the district court as follows:

> "Referring to the State Line Trustee's objections that the plan fails to give any weight to the earnings of the mortgaged property as actually operated since the date of filing of the Debtor's petition, the court cannot see why the past earnings of a bridge line should be measured by a different yard stick than the future earnings. The plan uses the same yard stick for both —a severance study—and correctly capitalizes earnings past and future on that basis." (R. 5018-19)

The trustee's claim that this conclusion was opposed by the testimony of one witness is not correct. (Petition of Irving Trust Co., p. 46) The testimony referred to, which was from another case, dealt only with the question whether

a severance value study of the New Jersey, Indiana and Illinois R. R., which is not a cut-off or bridge line, would determine its actual earnings. (R. 4358; Sav. Bank Com. Ex. 3) In striking contrast with the State Line, 84% of the traffic of the N. J. I. & I. originates or terminates on its line. (Sav. Bank Com. Ex. 3, p. 6)

The petition and brief of the State Line trustee contains repeated references to the figures shown by the segregation studies as if they were the "earnings" of the line. (For example, see p. 20) Those statements are misleading unless it is constantly borne in mind that the Commission and the lower courts found that the segregation studies did not show the true earnings of the State Line, and that the actual earnings of that line were shown by the severance studies.

The trustee's assumption that the earnings of the line are shown by the segregation studies is reflected in its argument that the lower courts have refused "to give effect to a pledge of income under a corporate mortgage." (Petition of Irving Trust Co., pp. 40, 41) The alleged discrimination between the State Line and other issues is based upon the same theory. (*Ibid.*, pp. 6, 11-12) No one questions the lien of the State Line mortgage on the actual earnings from its property. On the basis of its actual earnings as found by the Commission and confirmed by the court, it has been accorded fair and equitable treatment in the reorganization plan. Its claim for an impounding of its earnings is simply an effort to obtain payments in cash which would give it better treatment than is provided in the plan either to it or to other comparable issues. The lower courts properly held that approval of the plan renders moot the effort to attack it collaterally.

(3) *Contention that All Earnings of State Line Should Have Been Capitalized into Fixed Interest Bonds.*

The State Line trustee also claims that all of the earnings of the State Line, measured by the severance value studies, should have been capitalized into fixed interest bonds. The Commission decided that it was necessary to establish a margin of safety for the reorganized company and therefore capitalized into new fixed interest bonds only $3,400,000 of the average system depression earnings, which were approximately $5,600,000. (R. 3569) Of the available fixed charges, part were required to provide for fully secured claims such as equipment trust certificates. To require the Commission to set the fixed charges at such a level that all estimated depression earnings would be paid out as fixed charges would seriously endanger the success of the reorganization. The district court stated the answer to this contention as follows:

> "The Sparta Trustee objects that if severance value is to be used as a basis for allocation to the Sparta bondholders, then new fixed interest bonds should be allocated to an extent which will capitalize the dollar severance value. This objection cannot be sustained. Everyone recognizes that all of the earnings of the system cannot be capitalized in fixed interest bearing securities. It is imperative that the total earnings be capitalized partly in interest bearing securities and partly in stock and reasonable that they be capitalized partly in fixed interest bearing securities, partly in contingent interest bearing securities, and partly in preferred stock and partly in common stock, and it is both reasonable and fair that that part of the earnings ascribable to the Sparta line be capitalized in like manner. Like objections by the State Line Trustee and the Peoria Trustee are overruled for the same reason." (R. 5018)

B. No Substantial Question Is Presented by the State Line Trustee's Objections to Confirmation of the Plan Notwithstanding Its Rejection by Holders of a Minority of State Line Bonds.

Of the creditors voting on the plan, more than two-thirds of every class accepted it except Class 8, consisting of the holders of State Line mortgage bonds, of which the acceptance was by only a majority. The statute provides that if two-thirds of every class voting on the plan shall have accepted it, the court shall confirm the plan, provided such acceptances shall not have been procured by means forbidden by law. The statute does not specify a hearing in that event. If, however, "the plan has not been so accepted by the creditors", the statute provides for confirmation by the judge *after hearing,* if he is satisfied and finds: (1) that it makes adequate provision for fair and equitable treatment of the interests of those rejecting it; (2) that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and (3) that the plan conforms to the statutory requirements requisite to approval of the plan. (Section 77 (e))

In the present case, at the hearing on confirmation, evidence was presented as to the relevant facts concerning the rejection by the 49.63 per cent of the State Line bondholders who voted against acceptance of the plan. The evidence before the court on the hearing on confirmation showed that holders of bonds in the amount of $1,067,000 voted against acceptance of the plan, and that of these, $1,003,000 of bonds were voted by a single holder, namely, the Equitable Life Assurance Society and its affiliate, the Equitable Credit Union. (R. 5467) The four other holders of bonds who voted against acceptance of the plan held $64,000 face value. (R. 5467) The certificate of the Commission on the submission to creditors showed that holders

of $1,083,000 of bonds, or 50.37 per cent, voted to accept the plan. (R. 5317) The State Line bonds voting against acceptance are thus less than one-half of one per cent of the principal amount of all the debtor's bonds and debt securities of all classes which voted on the submission of the plan. (R. 5316-5319) Of creditors of all classes voting, 96.2 per cent in amount voted to accept the plan, and only 3.8 per cent to reject it, including the holders of State Line bonds.

The court had evidence that the Equitable Life Assurance Society had neither appeared nor participated in any way in the proceeding before the Commission looking toward reorganization, and that its participation before the district court at the hearings on the approval of the plan was limited to a three-sentence statement of position by its counsel. (R. 4562) Neither the Equitable nor any other holder of State Line bonds appealed from the orders of approval or confirmation or is petitioning for certiorari, the appeal having been taken and the petition for certiorari filed only by the mortgage trustee. After hearing the evidence for and against confirmation of the plan, the district court made the requisite findings. (Opinion, R. 5581; Decree, R. 5591-6)

The State Line trustee appealed from the decree, and in affirming it the circuit court of appeals stated:

> "The bond issue [State Line bond issue] is to secure a $2,500,000 loan. Over half of the bondholders in volume and number favor the plan. Less than one-half or about $1,000,000 in volume, are opposed to the plan. One creditor, with a claim of less than one-fourth of one per cent of debtor's total indebtedness is attempting to block and defeat the plan. And said creditor is speaking through a trustee who is misrepresenting a majority of the holders of bonds for whom

it speaks. And more, it asks compensation for itself and its counsel for performing this work."[1] (R. 5815)

As a reason in support of its petition for certiorari the State Line trustee states that "The decision of the Circuit Court of Appeals in confirming the Plan in spite of the failure of the requisite percentage of State Line bondholders to vote in favor thereof is based on an erroneous interpretation of Section 77(e)." (Petition of Irving Trust Co., p. 26) It may be noted, first, that the plan was confirmed by the district court and not by the circuit court of appeals. The petitioner's erroneous view that the appellate court is required to confirm the plan underlies much of its argument. Similarly, it contends that "the appellate court" is "required to determine the reasonableness of the rejection." (Petition of Irving Trust Co., p. 36) Section 77(e), on the contrary, provides for confirmation of a plan which has not been accepted by two-thirds of the creditors of each class by "the judge," clearly meaning the district judge and not the circuit court of appeals. This Court has so held in *Dickinson Co.* v. *Cowan*, 309 U. S. 382, 383 (1940).

The holding by the circuit court of appeals was that the evidence before the district court was sufficient to support its findings. (R. 5815) The petitioner does not challenge this conclusion or the sufficiency of the evidence. Instead, it contends that a finding is also necessary "that the rejection has been motivated by considerations foreign to the question of fairness of treatment or that the plan is so clearly favorable to the class in question that no reasonable man could do otherwise than accept it." (Petition of Irving Trust Co., pp. 34-5) The statute, however, makes no such requirement. The petitioner would read out of the statute the phrase which immediately follows and qualifies

[1] The court's reference here is to the contention of the trustee, which it appears now to have abandoned, that the allowance to it and its attorneys should be increased beyond the maximum of $16,654 which was fixed by the Commission pursuant to the provisions of Section 77(c)(12).

the words "not reasonably justified," namely, "in the light of the respective rights and interests of those rejecting it and all the relevant facts." Nor does the statute make necessary any finding that the minority of State Line bondholders who rejected the plan were "irrational in believing that the Plan did not give full recognition to their rights." (Petition of Irving Trust Co., p. 35) On the contrary, the findings which were made comply with the statute, and are fully supported by the evidence.

Although stating doubts as to the constitutional limits of the bankruptcy power, the petitioner avoids any direct charge that Section 77(e) or the court's action thereunder is unconstitutional. (See Petition of Irving Trust Co., pp. 21, 24, 26, 33, and 38-40) The authorities cited by the trustee readily explain this. Comments are quoted from the opinions in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935), and *Canada Southern Railway Co.* v. *Gebhard,* 109 U. S. 527 (1883), to the effect that bankruptcy compositions have been authorized when the composition was assented to by the required majority of the creditors. But this fact was not the basis of the decisions of the Court to which the trustee refers. In the *Radford* case the first Frazier-Lemke Act was condemned because of its plain purpose to enlarge the rights of the mortgagor at the expense of the mortgagee. The Court stated at page 589 that:

> "* * * the Frazier-Lemke Act is the first instance of an attempt, by bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security."

The issue decided by the Court was stated as follows at page 601:

> "The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value."

The *Radford* case is not applicable here.

In the *Gebhard* case this Court, as early as 1883, in reviewing the historical development of bankruptcy compositions, recognized the basis of such provisions as that contained in Section 77(e).[1] Following the words quoted by the petitioner, the Court stated:

> "Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character." (*Canada Southern R. Co.* v. *Gebhard* (1883) 109 U. S. 527, 536)

Certainly, reorganization on a sound financial basis of interstate railroads which are the essential arteries of national commerce, is not to be prevented by a few creditors, when the reorganization court finds that the plan provides fair and equitable treatment for their interests.

The only other authority cited in regard to the constitutional power of a bankruptcy court is *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, concerning which the trustee states that: "This case clearly points to the fact that the bankruptcy power is limited by requirements of due process." (Petition of Irving Trust Co., p. 39) If the petitioner intends to imply by this statement that the action below is lacking in any of the requirements of due process, such an implication is answered by numerous decisions of

---

[1] Half a century later the Court, in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648 (1935) again reviewed the constant growth of bankruptcy procedure, and said at page 671: "The fundamental and radically progressive nature of these extensions [of the bankruptcy power] becomes apparent upon their mere statement. * * * Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and the development of human activities from 1800 to the present day."

the Court. As stated in *Nebbia* v. *New York*, 291 U. S. 502, 525:

> "* * * the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

The procedure prescribed in respect to confirmation by the court provides ample protection for dissenters. A further hearing must be held and the judge must be satisfied and find that the plan provides fair and equitable treatment for those rejecting it and that the rejection was not reasonably justified. He must also make the findings specified in clauses (1) to (3), inclusive, of subsection (e). The nature of the proceedings held in this case in strict accordance with the requirements of the statute and the findings which were made after consideration of all the evidence, preclude the contention that any constitutional rights of the few bondholders who seek to obstruct the plan have been violated.

The State Line trustee's contentions are, we submit, wholly lacking in substance, and its petition for certiorari should be denied.

V.

THE PETITION FOR CERTIORARI OF SUSMAN, ET AL., HOLDERS OF UNSECURED CONVERTIBLE BONDS (Nos. 1002-3).

The debtor's 20-year Convertible 4¾ per cent Series A bonds of 1949 are outstanding in the principal amount of $72,335,000. Certiorari is asked on behalf of one Susman and others owning these unsecured bonds in the principal amount of $29,000, being four hundredths of one per cent of the principal amount outstanding. Eighty-seven per cent of the Convertibles voting on the plan accepted it. (R. 5319)

It is contended on behalf of Susman that the plan's treatment on the same basis of the Convertibles and the small amount of general claims is erroneous, for two reasons. The first is that the Convertibles are entitled under the indenture securing them to receive "$105 for each $100 plus accrued interest" if redeemed prior to 1944. (Abrams' Petition, p. 22) But the Convertibles are not in any sense being voluntarily redeemed pursuant to the provisions of the indenture. The fact that the Commission found that the permissible capitalization requires elimination of the old stockholders and cancellation of almost half of the Convertibles' claim, with the balance being recognized in new common stock, shows the extreme nature of the contention that a provision for payment of a premium upon redemption has any force in this proceeding.

The second ground of objection is that through "subrogation or conversion" the Convertibles acquired a lien on the Omaha bonds pledged with the Reconstruction Finance Corporation. Such a contention is frivolous, as shown by the opinion of the district court. (R. 5047-48)

We pray that the petitions for certiorari be denied.

Respectfully submitted,

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
Attorneys for Life Insurance Group,
11 South La Salle St.,
Chicago, Illinois,

FRED N. OLIVER,
WILLARD P. SCOTT,
Attorneys for Mutual Savings Bank Group,
110 East 42nd St.,
New York, New York.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
OLIVER & DONNALLY,
Of Counsel.